Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109

COMMENTS OF OMNITEL COMMUNICATIONS, INC. AND TEKSTAR COMMUNICATIONS, INC.

Thomas W. Cohen
Edward A. Yorkgitis, Jr.
Randall W. Sifers
Kelley Drye & Warren LLP
3050 K Street NW, Suite 400
Washington, DC 20007
(202) 342-8518 (telephone)
(202) 342-8451 (facsimile)
TCohen@Kelleydrye.com

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SUMMARY

OmniTel Communications, Inc ("OmniTel") and Tekstar Communications, Inc. ("Tekstar") are facilities-based rural competitive local exchange carriers ("CLECs"). OmniTel operates in smaller communities and less dense areas of Iowa, and Tekstar operates in similar areas in Minnesota. Their comments focus solely on the issue of access stimulation and the related rules proposed by the Commission in the NPRM.

1. Background on OmniTel and Tekstar in Regard to Access Stimulation. As rural CLECs, OmniTel and Tekstar are entitled under the Commission's rules to assess interstate switched access charges at the National Exchange Carrier Association's ("NECA's") Band 8 rates because each competes with a non-rural incumbent local exchange carrier. Accordingly, each is permitted to charge a total terminating switched access traffic rate on the order of $0.04 per minute of use. Even though they have been and are permitted to charge a NECA Band 8 rate, beginning more than three years ago, OmniTel and Tekstar separately entered into agreements with interexchange carriers ("IXCs"), most of whom had refused to pay their tariffed access rates. These agreements substantially lowered their rates for the termination of switched traffic for the IXCs that were parties to these agreements while ensuring that OmniTel and Tekstar would receive payment for significant portions of their access traffic. Today, OmniTel and Tekstar are subject to market agreements with IXCs covering approximately 80% of their interstate switched access traffic at rates substantially below the benchmark rate found in the Commission's rules.

2. A Market has Developed to Address Access Stimulation. Since 2007, when the Commission first examined access stimulation, it has issued a series of decisions to address the subject. First, in June, 2007, the Commission simultaneously issued a Declaratory Ruling prohibiting call blocking, which was directed primarily to IXCs, and an Order directed to ILECs

that had left the NECA traffic-sensitive pool following which their traffic volumes rose several-fold. In 2009, the Enforcement Bureau, in response to a complaint brought by Qwest against Farmers and Merchants Mutual Telephone Company, found, in light of the specific terms of Farmers' tariff and other evidence particular to that case, that Farmers violated sections 203(c) and 201(b) of the Communications Act when it levied access charges on Qwest for traffic Farmers had terminated to conference calling entities on its network, although the Commission also recognized that Farmers was still entitled to some measure of compensation for the services it performed. Most recently, the Commission issued a decision in the All-American complaint finding that "neither AT&T's failure to pay the CLECs' charges nor its failure to file a 'rate complaint' with the Commission violated any provision of the Act." Thus, the Commission has already acted to address concerns about access stimulation, and, in doing so, has helped foster private efforts to resolve disputes.

In addition to the salutary effects of the Commission's actions, it is evident that LECs and IXCs have (and have demonstrated that they have) incentives to resolve open compensation issues. OmniTel and Tekstar and many other LECs have entered into agreements with IXCs resolving matters. In short, because of the Commission's actions and the incentives of the carriers, a market has developed whereby LECs and IXCs find they have mutual interests to settle disputes and adopt terms for future traffic termination and the compensation for such services..

It is the case today, despite the existence and scope of the rural CLEC access charge rules, that any LEC engaged in terminating high volumes of interexchange traffic for its customers -- and those of the IXCs' customers who place the calls -- that wants to receive payment from an IXC for the carriage of that traffic must enter into an agreement with that IXC that reduces rates to levels far closer to the rates proposed by the Commission in the NPRM than the rates that are nominally available under the Commission's rules..

3. OmniTel and Tekstar Believe the Commission's Proposed Solution is Appropriate. Even though market-based solutions have developed, OmniTel and Tekstar believe the Commission's proposed solution and rules, as a whole, reasonably address any remaining concerns the Commission may have about access stimulation by rural CLECs for the following reasons:

a. The Commission properly focuses its solution on the sole issue of concern – ensuring that access rates a CLEC charges IXCs for switched access services when there is a revenue sharing arrangement are just and reasonable under Section 201(b) of the Act. The NPRM correctly recognizes traffic terminated by CLECs for IXCs is access traffic, and its proposed rules refuse to get sidetracked by allegations that revenue sharing agreements, which are prevalent throughout the communications industry, are not legitimate.

b. The Commission's proposed solution adopts rates that are presumptively just and reasonable since they approximate those in recently negotiated market agreements and are the lowest rates to which non-rural CLECs currently benchmark, and it rejects rates and triggers proposed by various parties in this proceeding that are unsupported by any evidence. Indeed, the proposed rules in question are tantamount to relegating rural CLECs to effectively the same benchmarking rules that apply to non-rural CLECs.

c. The Commission's proposed solution should largely eliminate uncertainty, litigation, and friction between rural CLECs and IXCs, although we believe the Commission needs to make clear that both CLECs and IXCs have obligations under the new rules: the CLECs to lower rates when they have entered into revenue sharing agreements, and the IXCs to pay and not dispute the charges for such traffic.

In sum, the proposed Commission's solution should eliminate any remaining arbitrage opportunities under the current rules while permitting LECs to charge and receive payment at a just and reasonable rate for the carriage of interexchange traffic between IXCs and end users.

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COMMENTS OF
OMNITEL COMMUNICATIONS, INC. AND TEKSTAR COMMUNICATIONS, INC.

OmniTel Communications, Inc. ("OmniTel") and Tekstar Communications, Inc. ("Tekstar"), through their undersigned counsel, hereby respectfully submit their comments to the Federal Communications Commission (the "FCC" or "Commission") in response to the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.[1] OmniTel and Tekstar are rural competitive local exchange carriers ("CLECs"). These comments focus solely on the

[1] *Connect America Fund et al.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (released Feb. 9, 2011).

issues surrounding so-called access stimulation and the Commission's proposed access stimulation rules in relation to CLECs.

I. INTRODUCTION AND SUMMARY

Since 2007, when the Commission first examined access stimulation, it has issued a series of decisions to address its concerns, which, by further defining permissible and impermissible activities, have helped enable a market for negotiations between CLECs and interexchange carriers ("IXCs"). First, in June, 2007, the Commission simultaneously issued a Declaratory Ruling prohibiting call blocking, which was directed primarily to IXCs,[2] and an Order directed against incumbent local exchange carriers ("ILECs") that had left the National Exchange Carrier Association ("NECA") traffic-sensitive pool following which their traffic volumes rose several-fold.[3] In 2009, the Enforcement Bureau issued a Second Order on Reconsideration in the complaint action initiated by Qwest Communications Corporation ("Qwest") against Farmers and Merchants Mutual Telephone Company ("Farmers") reversing an earlier finding that Farmers' access charges for traffic terminating to conference calling company customers were lawful.[4] In the Second Order on Reconsideration, considering Farmers' specific tariff language and other evidence in that case, the Commission found that Farmers violated sections 203(c) and 201(b) of the Communications Act, as amended,[5] when it levied access charges on Qwest for traffic terminated to conference calling entities on its network. More specifically, the Enforcement Bureau determined that, under the facts of the case, the conference

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2 *In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers, Declaratory Ruling and Order*, WC Docket No. 07-135 (rel. June 28, 2007) ("Traffic Stimulation NPRM").

3 *In the Matter of July 1, 2007 Annual Access Charge Tariff Filings*, Order, WCB/Pricing No. 07-10 (rel. June 28, 2007).

4 *Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Co.*, Memorandum Opinion and Order, 22 FCC Rcd 17973 (2007).

5 47 U.S.C. §§ 203(c), 201(b).

calling entities did not satisfy the definition of "end users" under the particular terms of Farmers' access tariff.[6] Notably, the Commission suggested that Farmers was entitled to some level of compensation even though its tariff was an insufficient basis for that compensation. Most recently, in a different proceeding addressing an access stimulation billing dispute, the Commission issued a Memorandum Opinion and Order finding that "neither AT&T's failure to pay the CLECs' charges [while disputing them] nor its failure to file a 'rate complaint' with the Commission violated any provision of the Act."[7]

The Commission's decisions have not been the sole factor influencing the actions of LECs and IXCs. Equally, if not more important, the IXCs adopted a general practice of refusing to pay access charges for high volumes of terminating traffic associated with conference calling entities. CLECs thus were faced with a difficult choice in seeking to collect charges for terminating the IXCs traffic: litigate, which was expensive, time-consuming and where the outcome was uncertain; or, negotiate lower rates. The reality is that, taken together, the Commission's actions and the IXCs practices have triggered a market response to the access stimulation issue -- CLECs and IXCs have reached and continue to reach settlement agreements that reflect much lower rates for terminating the IXCs' traffic when traffic volumes increase substantially as a result of revenue sharing agreements. In essence today, any CLEC that terminates high volumes of interexchange traffic as a result of a revenue sharing agreement will not receive payment from an IXC on whose behalf it terminates that traffic unless the LEC enters into an agreement with the IXC to reduce rates to levels far closer to the rates proposed by the

6 *In the Matter of Qwest Communications Corporation, Complainant, v. Farmers and Merchants Mutual Telephone Company, Defendant*, Second Order on Reconsideration, File No. EB-07-MD-001 (rel. Nov. 25, 2009) ("*Farmers and Merchants*").

7 *In the Matter of All American Telephone Co., e-Pinnacle Communications, Inc., and ChaseCom, Complainants, v. AT&T Corp., Defendant*, File No. EB-10-MD-003 (rel. Jan. 20, 2011) at 2.

Commission in the NPRM than the rates that would apply under the NECA tariff. OmniTel and Tekstar have entered into a number of such agreements with IXCs.

Even though market-based solutions have developed, OmniTel and Tekstar believe the Commission's proposed solution and rules are appropriate and should address any remaining concerns the Commission may have about access stimulation associated with rural CLECs. First, the Commission properly focuses its solution on the sole issue of concern – whether the rates a CLEC charges IXCs for switched access services are just and reasonable under Section 201(b) of the Communications Act of 1934, as amended.[8] The NPRM correctly recognizes that interexchange traffic terminated by CLECs for IXCs is access traffic, a categorization that is unaffected by the presence of a revenue sharing arrangement. The proposed rules appropriately decline to get sidetracked by IXC allegations that revenue sharing agreements, which are prevalent throughout the communications industry, are not legitimate. Second, the Commission's solution adopts rates that are presumptively just and reasonable. They approximate rates in current market agreements based on OmniTel's and Tekstar's negotiating experiences. Further, by benchmarking to Regional Bell Operating Company rates, the proposed rules would effectively subject rural CLECs terminating high volumes associated with conference calling companies as a result of revenue sharing arrangements to the same benchmarking rules that apply to non-rural CLECs. The proposed rules reject the arbitrary triggers proposed by various parties in this proceeding that are unsupported by any evidence. Finally, the Commission's solution will largely eliminate uncertainty, litigation, and friction between rural CLECs and IXCs. In sum, the Commission's solution should eliminate arbitrage

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[8] 47 U.S.C. § 201(b).

underlying access stimulation while permitting LECs to charge and receive payment at a just and reasonable rate for the carriage of interexchange traffic to and from IXCs.

A. OmniTel and Tekstar: Rural CLECs

OmniTel is a facilities-based, rural CLEC that has been operating in the State of Iowa since 2000. OmniTel serves a variety of residential and business customers in North Central Iowa, offering voice services, data and data management services, video and wireless GSM PCS services utilizing copper, coax and fiber to the home. As a rural CLEC, under the Commission's rules, OmniTel may assess interstate switched access charges at either the NECA Band 8 rates where it competes with a non-rural ILEC, or at rates benchmarked to the competing rural ILEC where it does not.

OmniTel is an issuing carrier in the Kiesling Associates LLP federal Tariff F.C.C. No. 2 and concurs in the Iowa Telecommunications Association Access Tariff No. 1 on file with the State of Iowa Department of Commerce Utilities Board ("IUB") under which it provides interstate and intrastate switched access services, respectively. Despite these tariffs, as of the third quarter 2008, the large majority of OmniTel's interstate interexchange access traffic was subject to IXC agreements. On September 24, 2008, at the direction of IUB, OmniTel filed with the IUB an amendment to its intrastate tariff, which reflects an agreement reached with Verizon in 2008. That agreement settled disputes between the parties regarding both interstate and intrastate access charges reflected in both federal court in the Eastern District of Virginia and before the IUB. As a result of this tariff filing, the rate and terms and conditions of that agreement are available to all interexchange carriers for OmniTel's intrastate access charges. The "single composite rate" for the provision of access services to OmniTel's IXC customers in this tariff amendment is $0.014 per minute of use ("MOU") – regardless of the amount of traffic exchanged between the LEC and IXC. This rate was and is comparable to typical access charges (inclusive of local switching, transport, and other applicable charges) that apply currently for carriers entitled to bill at NECA Band 1 rates. Today, OmniTel is operating pursuant to market agreements with IXCs covering approximately 80% of its interstate switched access traffic at rates far below the benchmark rate OmniTel is entitled to charge as a rural CLEC.

Tekstar is a facilities-based, rural CLEC operating exclusively in smaller communities and less dense areas of Minnesota since 1997. Tekstar provides telecommunications, Internet and video services to residential and business customers in its certificated area. Tekstar has approximately 15,000 customers, of which fewer than twenty are conference calling providers. Tekstar provides intrastate and interstate exchange access service to many telecommunications carriers, including AT&T, Qwest, Verizon, XO and Sprint. As a rural CLEC, Tekstar is entitled under the Commission's rules to assess interstate switched access charges at the NECA Band 8 rates because it competes with a non-rural ILEC. Accordingly, it is permitted to charge a terminating switched access traffic rate of approximately $0.043 per MOU for interstate access traffic.

Even though it is permitted to charge a NECA Band 8 rate (which Tekstar tariffed until recently), Tekstar entered into its first major agreement with an IXC to lower its rates substantially for the termination of interexchange switched traffic in January 2008. Today, Tekstar is subject to market agreements with IXCs covering approximately 80% of its interstate switched access traffic at rates, on average, in comparison with the this initial agreement, that are substantially below the benchmark rate Tekstar is entitled to charge as a rural CLEC. On September 16, 2010, Tekstar filed a new interstate access tariff (No. 3) that went into effect October 1, 2010. The tariff contains the following tiered marginal switched access rates, which reflect its experience with market negotiations:

A composite rate per MOU generated in the month of service by Interexchange Customer will be applied as follows:

Per MOUs > 0 and ≤ 5.0 Million	$ 0.0215
Per MOUs > than 5.0 Million and ≤ 25 Million	$ 0.014
Per MOUs > than 25 Million and ≤ 100 Million	$ 0.008
Per MOUs > 100 Million	$ 0.0055

II. MARKET-BASED SOLUTIONS ARE LARGELY ADDRESSING ANY ACCESS STIMULATION CONCERNS

A. The Best Evidence of Just and Reasonable CLEC Rates In the Presence of Revenue Sharing Arrangements Are Market-Based Agreements

In the 2001 *CLEC Access Charge Reform Order*,[9] the Commission ruled that rural CLECs may assess switched access rates up to the rates of the competing rural ILEC or, if the competing incumbent is not a rural carrier, the CLEC may set its rates up to the NECA's highest band for local switching (the so-called "rural exemption").[10] In establishing these rules, the Commission determined, in effect, that rates at or below the applicable benchmarks were *per se* just and reasonable. By the same token, rural CLECs that wish to charge rates above the benchmarks have been able to do so under the Commission's rules, but through carrier-to-carrier contracts.[11]

9 *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) ("*CLEC Access Charge Reform Order*").

10 47 C.F.R. § 61.26 ("*CLEC Access Charge Rules*").

11 *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9938, para. 40.

In its 2004 reconsideration of the *CLEC Access Charge Reform Order*,[12] the Commission specifically rejected a request to allow CLECs, on the basis of cost justification, to tariff above-benchmark rates or obtain arbitration of such higher rates when unable to negotiate them. The Commission emphasized that, from henceforth, it was regulating CLEC rates based pursuant to market forces, not cost factors.[13]

Certain IXCs have alleged in WC Docket No. 07-135 that allowing CLECs to set rates on the foregoing benchmarks provides an incentive for rural CLECs to engage in access stimulation activities, which the IXCs believe render CLEC access charge rates objectionable, even though they comply with the rural CLEC access charge rules. In short, the IXCs have sought changes to the current rules because they believe these rules, when rural CLECs sign up end users with large amounts of interexchange traffic accompanied by revenue sharing arrangements, are no longer consistent with the public interest and are not being employed as originally intended. As relief, the IXCs have sought rule changes that would reduce the permissible level of switched access charges when rural CLECs terminate large numbers of interstate interexchange minutes. In the interim, most IXCs have either stopped paying access charges of rural LECs with subjectively large traffic volumes – indeed, such IXCs typically pay nothing at all even though they continue to use the terminating service – or have entered into intercarrier agreements at rates far below what the current rules allow.

Numerous IXCs have submitted comments and *ex parte* letters and presentations in WC Docket No. 07-135 proposing new benchmarks to deal with the alleged access

12 *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, Petition of Z-Tel Communications, Inc. For Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, CC Docket No. 96-262 and CCB/CPD File No. 01-19, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108 (2004).

13 *Id.*, ¶ 57.

stimulation, but, as discussed later herein, none of these proposals are supported by sufficient evidence to allow the Commission to adopt the rule changes advocated to date by these IXCs. Notably, these various IXC-suggested rule changes essentially abandon the market-based principles the Commission's rural CLEC access charge rules, and CLEC access charge rules generally, were designed to reflect.

OmniTel and Tekstar, as noted above, have negotiated and entered into their own agreements over the past three-plus years with numerous individual IXCs – on occasion more than once with some IXCs – to ensure that payment will be received. The resulting rates for the termination of interstate switched access traffic have been substantially below the benchmark rate that OmniTel and Tekstar are entitled to charge as rural CLECs. As a result, the vast majority of Tekstar's and OmniTel's interstate access traffic has been and is covered by agreements with IXCs, and the rates for such traffic, on the whole, have continued to decline over the past several years under successor or newly-entered agreements. In general, OmniTel and Tekstar have been unable to collect invoiced fees for terminating interstate switched access traffic from IXCs with whom they do not have an agreement.

OmniTel and Tekstar understand that numerous other IXC-CLEC arrangements exist where revenue sharing arrangements are present, and they expect these agreement provide additional such evidence. OmniTel and Tekstar submit that the existence of their and other agreements provides persuasive evidence that, even with their divergent interests, rural CLECs and IXCs operating in an environment with the current Commission rules and orders can settle their disputes and arrive at market-based arrangements for the provision of future access services for so-called "stimulated traffic" without the imposition of additional regulation. The behavior of large IXCs has created a situation where a CLEC must either enter into an agreement at rates below the benchmark they are entitled to charge to ensure receipt of payment, or the CLEC must forego collecting access revenues in the interim and devote substantial resources over long periods of time to litigate, while facing a potentially uncertain outcome in the indefinite future.

In adopting any rules to establish rates or rate benchmarks, the Commission should rely on negotiated, market outcomes as a measure of reasonableness As noted by Verizon and Verizon Wireless, "the Commission and courts have long recognized that rates set through market-based negotiations are instructive in determining appropriate – and 'just and reasonable' – compensation rates."[14] The Commission thus has a sound basis, by relying on market agreements like those entered into by OmniTel and Tekstar, to establish and justify the rates (or rate benchmarks) it adopts.

B. Traffic Stimulation and the Myth of the LEC Terminating Monopoly

The NPRM expresses concern about the effects of an alleged "terminating access monopoly" and suggests that the "long-term endpoint for reform should address the flaws in the

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14 *In the Matter of High-Cost Universal Service Support*, WC Docket No. 05-337 (abbreviated citation), Comments of Verizon and Verizon Wireless, Nov. 26, 2008 at 50 ("Comments of Verizon"). *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9190-9191 para. 85 (2001) ("*ISP Remand Order*"); and, Comments of Verizon, n. 68: "*Petition of ACS Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958, ¶ 39, ¶ 40 n.136 (2007) (finding that "commercially negotiated rates" provide "just and reasonable prices"), *petitions for review dismissed*, *Covad Communications Group, Inc. v. FCC,* Nos. 07-70898 *et al.* (9th Cir. Jun. 14, 2007); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd ¶ 664 (2003) (finding that "arms-length agreements . . . to provide [an] element at [a] rate" "demonstrate[s]" that the rate is "just and reasonable"), *aff'd in pertinent part*, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 543 U.S. 925 (2004). *See also Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993) (holding, in an analogous context, that an agency "may rely upon market-based prices . . . to assure a 'just and reasonable' result"); *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish County*, 128 S.Ct. 2733, 2737 (2008) (reaffirming that the Mobile-Sierra doctrine requires an agency to "presume that the rate set out in a freely negotiated . . . contract meets the 'just and reasonable' requirement imposed by law")."

current system of intercarrier compensation" that result from this "monopoly."[15] The experiences of CLECs like OmniTel and Tekstar, however, demonstrate that while they may have a terminating monopoly *in theory*, they do *not in practice*. The simple and well-known fact is that, at least in the context of alleged traffic stimulation, some large IXCs have engaged (and continue to engage) in widespread self-help by disputing and withholding payment of charges, and, because the LECs cannot block traffic on non-paying IXCs, the LECs are forced to provide that service and do not get paid unless they go to court to collect. Going to court, however, is an unattractive and infrequently used option because litigation is slow and expensive and the outcome is uncertain. Thus far, to the best of our knowledge, no traffic stimulation case has yet reached trial even though some were initiated as early as 2007.

Because of the practice of self-help and the impracticality of pursuing payment through litigation, rural CLECs alleged to have engaged in traffic stimulation that wish to get paid for their access services enter into private settlements at rates substantially lower than provided by the Commission's current rules. As discussed earlier, for OmniTel and Tekstar, the vast majority of their access traffic is now covered by private agreements at rates that often approach, on average, only 10-15 % of the rates they are permitted to charge.

The negotiated rates that OmniTel and Tekstar charge under recently negotiated agreements are not the only proof that current market forces are working. As detailed by Northern Valley Communications, LLC, rates paid are decreasing across the market at the same time that traffic from access stimulation has been increasing substantially.[16] That is hardly the indicia of a monopoly or even the existence of substantial market power. If the CLECs had a

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15 NPRM, ¶ 524.

16 *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket 07-135, Letter from Northern Valley Communications to M. Dortch, at 5 (dated October 14, 2010).

terminating monopoly, then rates would not be falling, and the IXCs would not be receiving the negotiated, lower rates that they are receiving for this traffic.

It is apparent that market forces are working to protect the competitive market and consumers. As a result, CLECs do not enjoy a terminating monopoly as a practical matter, and there is no justification for regulating their switched access rates on that basis.

III. EVEN THOUGH MARKET-BASED SOLUTIONIS EXIST, THE COMMISSION'S PROPOSED TRIGGER AND RATES ARE APPROPRIATE

A. The Commission Has Properly Recognized that the Traffic at Issue Is Access Traffic for Which LECs Are Entitled to Payment

The Commission has properly recognized that, even though revenue sharing arrangements stimulate traffic, the resulting traffic fundamentally remains switched access traffic for which LECs may properly assess and collect access charges.[17] In addition, the Commission is correct to focus solely on altering the rates where LECs have entered into revenue sharing arrangements because of the anticipated substantially increased traffic volumes they generate and eschew seeking to limit revenue sharing arrangements *per se*. A categorical ban on revenue sharing arising from arrangements LECs may enter into with conference calling companies and similar enterprises would be inconsistent with Commission precedent and widely accepted and utilized industry practices.

B. The Commission Has Proposed a Rational and Workable Trigger for Modified Access Charge Rules for CLECs

The Commission proposes to subject LECs to modified access charge rules "based on the existence of access revenue sharing arrangements."[18] OmniTel and Tekstar

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17 *See e.g.,* NPRM ¶ 658 ("We therefore propose revisions to our interstate access rules…").

18 *Id.*, ¶ 659.

support adoption of this trigger. As the Commission notes, "access revenue sharing arrangements commonly are used to facilitate access stimulation activity."[19] Such arrangements are thus strong indicia of prospective or continued higher traffic volumes. Consequently, the existence of or entry into such arrangements is a reasonable and workable surrogate for substantially increased traffic volumes and would serve well as a trigger for the lower rates proposed.[20] In contrast, as OmniTel and Tekstar have explained in earlier submissions and summarize below, a variety of triggers and certification requirements proposed by IXCs and others are arbitrary, effectively prohibiting legitimate activities, and would be unduly burdensome and ultimately discriminatory among LECs.

The NPRM seeks comment on the enforceability of the proposed adoption of a trigger based on the existence of access sharing arrangements.[21] The trigger is clear for LECs as they know when they enter into such an arrangement or if they have them already. The trigger may also be enforced by IXCs. Many LECs with such arrangements are already well known to the IXCs, who have been diligent in casting a wide net in recent years to identify those LECs with such agreements. In the event any LEC fails to modify its tariff after entering into such arrangements, the IXCs would still be able to enforce the rule. IXCs are well-aware of LEC traffic volumes, and any spike in volume without the LEC filing a modified tariff under the proposed rules would be quickly reported as a potential access sharing arrangement.[22] Thus, as

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19 *Id.*

20 OmniTel and Tekstar note that the Commission, by employing access revenue sharing arrangements as a trigger, is not declaring that such arrangements violate the Act. Rather, the Commission solely looks to the presence of such agreements as a trigger for a different set of access benchmarking rules to apply.

21 NPRM, ¶ 659.

22 Indeed, multiple IXCs quickly identified the higher traffic volumes of OmniTel and Tekstar. Those IXCs then stopped paying and disputed OmniTel's and Tekstar's charges on the suspicion that the carriers had entered into revenue sharing agreements and the

the Commission indicates, there is no need to adopt additional burdens that rely on CLEC certification or additional reporting.[23] The adoption of such new measures, which would fall on all CLECs, whether they have ever engaged in a revenue sharing arrangement or not, would be regulation for regulation's sake. As an overarching matter, it is difficult to see how such regulations would promote the public interest. In addition, were the proposed trigger part of the Commission's rules, CLECs would have an additional incentive to comply because the failure to modify the tariff and continue to charge rates under the existing rural exemption would be a continuing violation, exposing the carrier to substantial potential forfeitures. Moreover, no CLEC could expect to receive payment following a spike in such traffic without modifying its tariff or offering satisfactory proof to the IXCs that it is not a party to a revenues sharing arrangement. The traffic stimulation issue the Commission is seeking to address in its rulemaking – where the concern is that rates that do not reflect high traffic volumes -- is tied to revenue sharing agreements. As such, the Commission's proposal to use such an agreement as the trigger is tailored precisely and appropriately to fit the issue at hand.

C. Revenue Sharing Arrangements Are Consistent with the Public Interest

In the NPRM, the Commission seeks comment on whether sharing arrangements are in the public interest.[24] Revenue sharing has long been a common business practice in the telecommunications industry. Telecommunications carriers have long shared service revenues, provided free service or given other inducements to entities that generate large volumes of traffic, whether they are hotels, airports, shopping malls, payphones concessions, telemarketing groups, call centers, or any number of other high-volume traffic generators. Moreover, every

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allegations that such arrangements and the rates the carriers were charging as a result were unlawful.

23 *Id.*, ¶ 658, n.1021.

24 *Id.*, ¶ 660.

discount off standard pricing offered by a telecommunications provider to an end-user is effectively a form of revenue sharing to that end user for the purpose of stimulating traffic.

Telecommunications carriers are increasingly using creative techniques to stimulate traffic as competitive pressures increase. For example, for several years, AT&T's CMRS affiliate, AT&T Mobility had an exclusive arrangement with the popular television show "American Idol" to provide a services that allows viewers to vote for their favorite contestant by text message or cell phone call. This basic model to stimulate traffic has been adopted ubiquitously in the marketplace. As further examples, carriers have entered into revenue-sharing arrangements with broadcasters to use text messaging to make money through selling sponsorships to advertisers interested in reaching consumers with meaningful text messaging information. Carriers have also entered into revenue-sharing arrangements with sports teams to allow fans to use text messaging during sporting events to encourage crowd interaction during the event and routinely enter into arrangements with various promoters to allow contestants to use an 800 number to place a vote or enter a contest. As these few examples demonstrate, efforts to stimulate traffic are manifold in today's competitive environment and are limited only by the imagination. Revenue sharing arrangements are an important tool in the competitive provider's tool box and the widespread use of this tool reveals a robustly competitive marketplace.

Because access service is typically wholesale in nature, when a provider of access services sees an increase in its usage, another class of carriers, namely interexchange carriers using access providers' services, also sees an increase in the use of their own services by end users. Consequently, increased access usage is a harbinger of considerable public benefits. First, end users see the advantage in increased use of the services they are purchasing from their interexchange service providers, with derivative social and economic benefits. Second, the carriers serving and billing these end users experience additional usage of their facilities and an attendant increase in overall efficiency. If the end users take their long distance service on a per unit basis, increased traffic means additional revenues. Similarly, an overall increase in usage may present opportunities for IXCs that employ other billing models to increase their rates. Third, any underlying carriers providing wholesale services, including access service providers, also receive the benefits of additional traffic on their facilities and increased revenues. The Commission should not chill the ability of rural and other CLECs and their communities to recruit the local of businesses, such as call centers, including through the use of revenue sharing agreements.

On several previous occasions the Commission has concluded that arrangements involving marketing fees paid to customers and others to simulate traffic (and carrier revenues) do not fundamentally alter the nature of the traffic or somehow render the telecommunications services *per se* unlawful.[25] In *Jefferson Telephone*, the Commission stated very plainly, after reviewing the billing and revenue sharing arrangement in that case involving a conference calling company, that "AT&T has not met its burden of demonstrating that Jefferson's practice here is unjust and unreasonable."[26] Further, in the Commission's *Access Charge Reform* proceeding, numerous commenters detailed the prevalence in the marketplace of arrangements involving marketing fees and commissions paid by carriers to stimulate traffic.[27] In response, the Commission declined to find that such arrangements between carriers and customers based upon minutes of use or revenue levels generated by customer-stimulated demand were unjust or

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25 *E.g.*, *AT&T Corp. v. Jefferson Telephone Company*, Memorandum Opinion and Order, 16 FCC Rcd 16130 (2001) ("*Jefferson Telephone*"); AT&T Corp. v. Frontier Comm's of Mt. Pulaski, Inc., Memorandum Opinion and Order, 17 FCC Rcd 4041 (2001) ("*Frontier*").

26 *Jefferson Telephone*, 16 FCC Rcd at 16136, para. 13.

27 *Access Charge Reform*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9140-41 paras. 66-67 (2004).

unreasonable, unlawful or illegitimate.[28] In sum, the Commission should not find that the existence of an access charge revenue sharing agreement raises concerns about whether the LEC's practices are just and reasonable (and a potential violation of Section 201) because such agreements can occur for legitimate purposes and are in the public interest.

D. The Commission's Rate Benchmarking Approach is Generally Reasonable

The NPRM seeks comment on the proposal that CLECs satisfying the revenue-sharing-arrangement trigger would be required to benchmark to the rate of the BOC in the state in which the CLEC operates, or the independent ILEC with the largest number of access lines in the state if there is no BOC in the state.[29] OmniTel and Tekstar believe that the proposed benchmarking is not unreasonable. Since the *Competitive Carrier* proceedings in the mid-1980s, the Commission has steadfastly declined to impose non-market regulation on competitive carriers. In those orders, the Commission streamlined the tariffing procedures for non-dominant carriers and paved the way for future non-cost-based regulation of CLECs predicated on benchmarking of rates. Following the passage of the Telecommunications Act of 1996, the Commission has not required CLECs to cost justify their services, including exchange access services, has permissively detariffed those services, and has generally relied upon market forces to shape the rates that CLECs assess for access services. In the *CLEC Access Reform Order*,[30] the Commission continued this trend by declining to impose any cost-based regulation – or

[28] *Id.*, n.257. *See also California Payphone Assoc. Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California*, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14193, 14207, n.87 (2004) (Commission finds lawful a 32% revenue sharing agreement for payphone usage between a municipality and the ILEC providing the phones.

[29] NPRM, ¶ 665.

[30] *Access Charge Reform Order*, Seventh Report and Order, 16 FCC Rcd 9923 (2001).

attending concepts such as over earning – on competitive providers of access services, instead adopting benchmarking as a market-approximating check on CLEC rates.[31]

Significantly, then, the current regime applicable to CLECs – benchmarking – is not cost-based but rather based on a market paradigm.[32] As the rates to which maximum CLEC rates are benchmarked decline (or increase), so too must CLEC rates, regardless of whether their own cost structures have changed or costs have declined (or increased).

The exemption for rural CLECs is merely a special case of this overall benchmarking regime, but wholly consistent with it. Similarly, the proposed rules are also wholly consistent with the benchmarking approach. The only relief CLECs have to such extraneous limits being imposed is the marketplace response of negotiated rates with IXCs. Indeed, when, on reconsideration of the *CLEC Access Reform Order*, TDS sought the ability for CLECs to cost-justify higher rates – where benchmarked rates would not allow them to reasonably recover their costs and a reasonable amount of overhead and profit – the Commission pointedly declined to allow CLECs this opportunity.[33] In so doing, the Commission clearly signaled that it did not require CLEC rates to be related to costs but expected those rates to be the result of extraneous market forces.[34] From the experiences of OmniTel and Tekstar, the present

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31 *Id.* at 9938, 9940-41. The Commission noted the "extreme difficulty" of establishing access rates for CLECs. *Id.* at 9941.

32 *Id.* at 9945, 9948 (goal of bringing CLEC rates toward a competitive market model). OmniTel and Tekstar submit that CLECs should not, as they do not today, have to comply with Section 61.38 of the Commission's rules to justify their rates. Any requirement the Commission may adopt in this regard in the present proceeding, about which OmniTel and Tekstar take no position, should be limited to incumbent LECs.

33 *Access Charge Reform*, Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9135-36 (2004).

34 In the *CLEC Access Reform* proceeding, the Commission never made a specific finding that the cost-structure of CLECs – let alone rural CLECs in particular – was similar to that of ILECs, whether in high-cost rural areas or otherwise. The benchmarking regime

proposed benchmarking for LECs that enter into revenues sharing arrangements reflects where the market is already evolving.[35].

E. The Commission's Deemed Lawful Proposal is Reasonable

The NPRM also seeks comment on the proposal to require LECs that meet the relevant trigger to file tariffs on not less than 16 days' notice.[36] Congress adopted the "deemed lawful" provision of Section 204(a)(3)[37] to provide carriers with some stability and certainty with regard to their pricing. OmniTel and Tekstar believe that LECs that entered into revenue sharing arrangements and subsequent tariff modifications are entitled to have their tariffs deemed lawful. There is no reason to deny a carrier the Congressionally conferred benefits of the deemed lawful status of its tariff if it conforms to the Commission's rules and files a tariff containing rates sanctioned by the rules. LECs that adhere to the rules adopted in this proceeding should be entitled to payment by IXCs that use the LECs' networks to terminate their traffic to conference calling companies, chat line providers, other high volume customers, as well as other "low volume" business and residential customers. The adoption of a "16 day" notice requirement is

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was not meant to reflect any such conclusions, and benchmarked rates were not intended to be CLEC proxies for cost-based rates.

35 In response to market forces – *i.e.,* IXC refusal to pay rural CLEC tariffed access rates for high volumes of terminating traffic – CLECs such as OmniTel and Tekstar have negotiated agreements with IXCs under which CLECs charge substantially lower terminating access rates. The rates negotiated to date are far closer to existing RBOC rates than the currently allowed rural CLEC rates. But OmniTel and Tekstar came to the table with the IXCs desiring to receive payment. Hence market forces have forced reductions in CLEC access rates well below the Commission's established benchmark for rural carriers and towards the benchmark applicable to non-rural CLECs – namely the RBOC rates.

36 NPRM, ¶ 666.

37 47 U.S.C. § 204(a)(3).

not objectionable to OmniTel or Tekstar and provides sufficient to allow an opportunity for review by interested parties.

F. The Alternative Proposals for Addressing Access Stimulation are Arbitrary and are Fraught with Administrative or Enforcement Problems

Apart from the revenue sharing agreement trigger, the NPRM seeks comment on other alternatives for addressing access stimulation that would apply modified access charge rules to LECs in the case of particular triggering events or circumstances.[38] In particular, the NPRM seeks comment on whether the alternative trigger-based approaches may be more easily enforced than the revenue sharing agreement trigger and the extent of any regulatory burdens associated with each approach.[39] As summarized below, OmniTel and Tekstar have already addressed these proposals at length previously; all of these proposals are deeply flawed and should not be adopted.

1. The USTelecom Proposal Should Be Rejected

In a lengthy *ex parte* filed on October 28, 2010 in WC Docket No. 07-135 and CC Docket 01-92,[40] Tekstar discussed in detail the many flaws with the USTelecom proposal. Since that discussion is already part of the record for these proceedings, OmniTel and Tekstar will summarize the key reasons as to why the Commission should reject the USTelecom proposal. First, the trigger in the USTelecom proposal is arbitrary, reflecting neither market conditions nor actual cost causation associated with switched access services.[41] Second, its terminology and requirements are vague and thus would set in motion a new round of

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[38] NPRM, ¶ 667.

[39] *Id.*

[40] Traffic Stimulation NPRM, *Ex Parte* filing of Tekstar, October 28, 2010.

[41] *Id.* at 2-5.

litigation.[42] Third, its certification, reporting, and tariffing obligations are excessive and would unduly burden rural CLECs.[43] Fourth, the proposed rules would potentially result in disparate obligations being imposed for up to a year on CLECs with similar access traffic volumes per line. [44] Finally, the USTelecom proposal seeks to limit the legitimate practice of revenue sharing, when, as indicated by the market agreements, the only issue in dispute is the terminating access rate.[45]

2. Proposals Seeking to Ban Revenue Sharing Ban are Unreasonable, Harming Legitimate Industry Practices; The Key Legal Requirement is to Ensure that Rates for Traffic Terminated under a Revenue Sharing Arrangement Are Reasonable

USTelecom and a proposal made in 2008 by AT&T Services, Inc. ("AT&T") and the Rural Independent Competitive Alliance ("RICA") ("AT&T/RICA Proposal")[46] both propose an additional rule that is entirely unnecessary and inappropriate for a number of reasons. Specifically, USTelecom and AT&T/RICA propose that the Commission adopt a rule stating that "it shall be an unjust and unreasonable practice for any LEC to assess intercarrier compensation – including, for example, access charges, reciprocal compensation charges, or charges assessed under 47 C.F.R. § 20.11 arrangements – on traffic that is subject to a revenue sharing

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42 *Id.* at 5 & n. 19.

43 *Id.* at 7.

44 *Id.* at 6-7.

45 *Id.* at 8-9.

46 *See* Letter of Brian Benison, Director-Federal Regulatory, AT&T Services, Inc. and Steve Kraskin, Legal Counsel, Rural Independent Competitive Alliance, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, WC Docket No. 07-135 (filed Nov. 25, 2008) ("*AT&T/RICA Ex Parte*"). Shortly after the AT&T/RICA Proposal was submitted, Verizon and Qwest filed in general support of the AT&T/RICA Proposal with modifications. *See* Letter from Donna Epps, Vice President-Policy, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, WC Docket No. 07-135 (filed Jan. 14, 2009) ("*Verizon Ex Parte*"); Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest Communications International, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-135 (filed Jan. 6, 2009) ("*Qwest Ex Parte*").

arrangement."[47] First and foremost, this proposed "revenue sharing" rule should be rejected because it is not needed to address the access stimulation issue. The core issue before the Commission is the determination of whether the access rate level charged by a rural CLEC that enters into revenue sharing arrangements is just and reasonable.[48] Once the issue of level has been resolved, the Commission's work is done and there is no need to proceed to examine the revenue sharing arrangement well. OmniTel and Tekstar maintain that their agreements with IXCs and their recently-filed tariffs containing rates that are substantially below the rate rural CLECs are entitled to charge under the Commission's rules provide sufficient basis for the Commission to determine what constitutes a proper rate level.

USTelecom and AT&T/RICA fail to explain why it is unjust or unreasonable for a rural CLEC to enter into a revenue sharing or similar arrangement with a customer that offers an information service, or makes or receives large volumes of calls (*e.g.*, a call center), if the rate assessed by the CLEC complies with the Commission's rate level requirements. USTelecom and AT&T/RICA simply assume that the practice of revenue sharing in this context is *per se* unjust and unreasonable or conclusive evidence of other unlawful activity even if the rates charged are just and reasonable. It is not surprising that the IXCs cannot point to how such arrangements harm them if the rate they are assessed is at a reasonable level. In reality, once the Commission satisfies itself that rural CLEC rates are reasonable if set at or below certain levels, revenue sharing by rural CLECs that comply with those rate level requirements would not cause any party harm. Thus, the Commission would set a troubling and unjustified precedent if it were to

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47 *USTelecom Oct. 8th Ex Parte*, Attachment at 3. *See also AT&T/RICA Ex Parte*, Attachment, at 2.

48 *See* Traffic Stimulation NPRM at ¶ 1 ("In this Notice, we initiate a rulemaking proceeding to consider whether the current rules governing the tariffing of traffic-sensitive switched access services by local exchange carriers (LECs) are ensuring that rates remain just and reasonable…").

effectively outlaw revenue sharing by rural CLECs that are otherwise in compliance with its access charge rules.

Any proposed revenue sharing prohibition also should be rejected because it would be potentially harmful to carriers of all types. Since the proscription against revenue sharing would presumably be independent of any rate issues and would be grounded on the obligation of all carriers under Section 201(b) of the Act[49] not to act in an unjust and unreasonable manner, any anti-revenue sharing rule would have to be applied to all carriers and could not justifiably be limited to rural CLECs. Further, to be effective, the rule could not be limited to a narrow definition of revenue sharing. Consequently, notwithstanding USTelecom's representation that its purpose is not to "constrain legitimate business arrangements,"[50] the rule necessarily would be overbroad, unnecessarily (and unfairly) encompassing carriers and carrier-customer arrangements far beyond the specific context of the USTelecom and AT&T/RICA proposals. In addition, any anti-revenue sharing rule would be extremely difficult to administer and enforce in an even-handed fashion given the nearly infinite variety of incentive arrangements routinely entered into by LECs and their customers.[51] And any attempt at enforcement of the rule would necessitate the dedication of significant resources by the Commission – resources that the Commission can ill afford to devote to any new administrative enforcement effort.

Finally, a rule proscribing revenue sharing would likely do nothing to mitigate the excessive costly and burdensome litigation that has plagued the industry for the past several

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49 47 U.S.C. § 201(b).

50 *USTelecom Oct. 8th Ex Parte*, at 5.

51 *See, e.g.*, Joint Reply Comments of PAETEC, Citynet, Granite, RCN Telecom, and US TelePacific, WC Docket No. 07-135 (filed Dec. 22, 2008), at 34-40 (revenue sharing proscriptions would create anticompetitive burdens on all carriers and would be virtually impossible to administer fairly given the wide plethora of arrangements and incentives used by incumbent and competitive carriers with their customers).

years. Instead, the rule would become just another excuse for IXCs to unilaterally withhold proper access charge payments to rural CLECs, *i.e.*, to continue in the unlawful practice, which many IXCs have routinely engaged in often over the past few years, thus leading to further litigation.

In contrast, the Commission's proposed rule strikes an appropriate balance. While a revenue sharing arrangement is the trigger that the rates heretofore charged can no longer be charged, the consequence is not that no access charges may be assessed, but only that the benchmarking is now subject to a different standard. Moreover, such a rule drastically would limit the room for IXCs to withhold payment for the services they take and to challenge a LECs access charges when it has entered into a revenue sharing arrangement.[52]

3. The Iowa Utilities Board High Volume Access Charge Rule Does Not Provide a Sound Basis for Any Commission Rule

The IUB adopted a number of reforms in the *Iowa Order*[53] applicable to "high-volume access services" ("HVAS"), which it defined as access growth of more than 100 percent in a six month time period. In the *Iowa Order*, the IUB identifies traffic stimulation as occurring where the existing rate is premised on a relatively low volume of switched access traffic but the actual volume is much greater, potentially requiring a reduction of the rate on the theory that per

52 One of the Commission's objectives in this proceeding should be to adopt a rule that not only makes clear that LECs entering into revenue sharing arrangement with their end user customers must modify their tariffs to reflect the BOC rate, but that IXCs cannot contest the payment of access charges for interexchange traffic they send such LECs for termination to such customers on the LEC's facilities. The rules the Commission adopts in this preceding should not only make clear when LECs must charge the lower benchmarked rates, but also expressly negates the sort of hyper-technical argument that Qwest, for example, made in the *Farmers and Merchants* case that the conference calling companies in that case were not end users and therefore the service was not tariffed access charges.

53 *High Volume Access Service*, Docket No. RMU-2009-0009 (Iowa Utilities Bd. 2010) ("*Iowa Order*").

MOU cost decreases as volume increases.[54] Focusing on the proper rate for HVAS, the IUB concluded that revenue sharing is not the problem – a conclusion supported in the proceeding by XO, Paetec, and the Consumer Advocate, finding "that a blanket prohibition on revenue sharing agreements could result in unintended consequences in the form of prohibiting legitimate business arrangements (sales on commission, for example)."[55] Finally, the IUB finds that the traffic terminated in HVAS arrangements is access traffic, a conclusion with which OmniTel and Tekstar agree.

However, while the IUB's approach is correct, the resulting rules are sufficiently problematic that the Commission should not use them as a basis for any rules it adopts. At the outset, it is important to recognize that the IUB found that because its statutory authority differs significantly from the Commission's -- it does not have rate regulation jurisdiction over a LEC's intrastate access charges to the same extent as the Commission has over interstate access charges -- it must fashion its own unique solution. [56] Unfortunately, the *Iowa Order* established an awkward and burdensome process before a LEC can collect access charges for the provision of a HVAS: (1) 6 months notice prior to offering service; (2) notice to any carrier with which it exchanged traffic over the preceding 12 months; (3) 60 days of negotiation with each of those

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54 *See Iowa Order* at 1. ("[T]hese amendments are focused on situations in which an LEC's rates for intrastate access service are based, indirectly, on relatively low traffic volumes, but the LEC then experiences a relatively large and rapid increase in those volumes, resulting in a substantial increase in revenues without a matching increase in the total cost of providing service.").

55 *Iowa Order* at 10.

56 *Iowa Order* at 4-5. ("Iowa Code § 476.11 gives the Board jurisdiction over the terms and procedures under which toll (or interexchange) communications are interchanged, but only after a written complaint is filed by one of the telephone companies involved. This complaint-based jurisdiction means the Board is unable to order individual LECs to file new tariffs for switched access service rates on its own initiative, as the FCC has proposed to do in the FCC Notice. Thus, while the Board is aware of the FCC Notice and has given it consideration when preparing this order, the Board is not proposing to adopt the same type of rules that the FCC has described.").

carriers; and (4) the filing of a tariff to reflect an agreement with a carrier on the rates for such traffic, or the filing of a complaint with a tariff which the Board must review and approve based on an incremental cost standard (excluding marketing payments).

There are many problems with the process established in the *Iowa Order* for collecting access charges for HVAS. First, the six-month notice period delays the initiation of legitimate services. Second, the notice and negotiation requirements are particularly onerous. The LEC is forced to negotiate with all entities and, if any one does not agree, a tariff complaint with cost support information must be filed with the IUB. Finally, the approval process will subject CLECs to full blown cost proceedings – a practice the Commission has eschewed. Because of all of these flaws, the IUB's HVAS rules should not form the basis of any decision by the Commission.

4. The Qwest Business Partner Proposal Suffers from Numerous Flaws

Qwest's Business Partner Proposal too is flawed in several ways. Qwest introduced the proposal in an *ex parte* presentation on Access Stimulation that was made to Wireline Competition Bureau staff in 2008.[57] This presentation makes the notable assertion that market-based solutions are not practical and then bases its proposal on that assertion.[58] The experiences of OmniTel and Tekstar, however, show otherwise – each has entered into numerous

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57 Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135 (filed April 25, 2008) ("*Qwest Access Stimulation Presentation*").

58 *See Qwest Access Stimulation Presentation* at 4 (stating, in part –

- No evidence that market-based solutions are practical.
  - Agreements not feasible given filed-rate doctrine, obligation to deliver traffic, and rate-averaging obligations.
  - If agreements exist, no evidence of that they contain.
    - No agreements in FCC record.
    - Not filed with Iowa Board, as required.)

agreements with IXCs, including OmniTel's just completed confidential agreement with Qwest which led to the withdrawal of an informal complaint before the Commission. Moreover, the agreements that OmniTel and Tekstar have negotiated with individual IXCs to establish the access rate for the termination of interstate switched access traffic demonstrate that (1) IXCs and LECs agree that the way to deal with the traffic stimulation issue is to lower rates as volumes increase, and (2) that the Commission's proposed rate solution reflects a market solution in circumstances where there are revenue sharing arrangements. The existence of these agreements further demonstrates that limitations on revenue sharing arrangements are unnecessary and do not represent a sensible and efficient solution to the perceived problem.

Notably, Qwest's first solution in addressing access stimulation is to control rates, with which OmniTel and Tekstar would agree in principle.[59] Qwest's second solution is the "Business Partner" proposal, which would prohibit a LEC from charging switched access rates "to traffic that is terminated to (or originated by) an entity that is the LEC's 'business partner.'"[60] This is much more problematic. Qwest defines a "Business Partner" "as a user of LEC telecommunications service that receives more net compensation from the LEC in connection with the traffic than it pays the LEC for the related telecommunications service."[61] The only way a LEC can charge for such traffic is to enter into an agreement with an IXC or to receive revenues from the business partner.

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59 *See Qwest Access Stimulation Presentation* at 5 (stating, in part –

- The access stimulation problem can be addressed either:
  - by controlling rates, or
  - by forcing cost-causers to bear their costs.

60 *See Qwest Access Stimulation Presentation* at 6.

61 *Id*.

The fundamental problem with the Business Partner approach (apart from the fact that Qwest would have the functional equivalent of access services deemed something other than access services) is that it effectively makes unlawful revenue sharing agreements which result in no-net payment, a practice engaged in throughout the industry and recognized as legitimate. Qwest's insinuation that the traffic – calls placed by its own interexchange customers or those of other IXCs who route the traffic to Qwest for completion – is somehow not legitimate is unfounded. Qwest's proposal thus is overly broad both in seeking to outlaw legitimate practices and in applying the solution to LECs outside the access stimulation context. Moreover, the solution would give a windfall to IXCs who would continue to assess interexchange toll charges for the traffic or collect from unaffiliated IXCs who send their traffic to such IXCs on a wholesale basis but refuse to pay other carriers they reply upon to terminate the traffic. Significantly, the IUB in its order adopting the HVAS rules, which Qwest cites favorably in its June 17, 2010 *ex parte* letter in 07-135,[62] refused to ban revenue sharing agreements. The IUB found such a ban "could result in unintended consequences in the form of prohibiting legitimate business arrangements."[63]

Qwest's proposal also is flawed because it provides no recourse for a LEC to obtain regulatory sanction for its rates for services that are indistinguishable from access services – for obvious reasons because they *are* access services. At least the rules adopted by the IUB in the *Iowa Order*, which have multiple flaws (as described above), permit a LEC to submit its rates for approval by the IUB and collect for the access services it performs to the benefit of IXCs and their customers.

62 Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135 (filed June 17, 2010).

63 *Iowa Order* at 10.

Finally, the Qwest proposal is burdensome for regulators and LECs. It will inject regulators into a close examination of LEC business arrangements throughout the industry – an overwhelming task given the number of LECs and number of business arrangements. In contrast, the Commission's proposal to use revenue-sharing agreements as a trigger can be policed relatively easily since LECs with such an agreement will come forward and file a new tariff because they know that IXCs will investigate and may file a complaint if traffic volumes rise significantly and no new tariff is on file. In the absence of required tariff changes, the CLECs, presumably, would risk foregoing all compensation should a complaint be filed and they have not followed the rules. Moreover, the rates being proposed in the NPRM are nothing other than the rates that already apply to non-rural CLECs that compete with the BOCs. Qwest has provided no rationale for the application of a lower rate prior to comprehensive intercarrier compensation reform.

G. Other Issues

1. Revenue sharing arrangements do not constitute an unlawful rebate under Section 203(c)

The Commission seeks comment on whether a LEC providing tariffed services to a customer with whom it also enters an access revenue sharing agreement but not with other similarly situated customers violates Section 203(c).[64] Based on the statute and the Commission’s prior findings, it is clear that such an arrangement does not violate the Act.

To begin with, conference calling company customers and other high volume customers with revenue sharing agreements are not similarly situated with other customers. The high volumes of traffic terminated to such customers distinguish them from other local

64 NPRM, ¶ 677.

customers. For example, Tekstar has approximately 15,000 end user customers. Fewer than twenty of these customers have revenue sharing arrangements, and those that do receive incoming calling in volumes that dwarf by several orders of magnitude the volumes of traffic of Tekstar's other business and its residential customers. Moreover, customers entering into revenue sharing arrangements typically engage in marketing and related activities which increases the number of access minutes of CLECs. Other customers that are not similarly situated do not engage in such activities.

The payment of commissions (or similar payments) independent of tariffed services is not a violation of Section 203(c) in and of itself.[65] Revenue sharing agreements in which the customer are assessed the tariffed rate, but may also receive some separate and independent payment, whether the payment is a commission or the result of a revenue-sharing agreement, do not violate Section 203(c)(2).[66] In an analogous context involving traffic aggregators, the Commission found that "'[C]omission payments to traffic aggregators for delivery of [certain types of traffic], a standard practice in the operator services industry, are a legitimate business expense' paid to the aggregator in return for the ability or right to receive [that] traffic."[67] This Commission upheld the ability of aggregators to receive commissions from

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65 *International Telecharge, Inc. v. AT&T Co.*, Memorandum Opinion and Order, 8 FCC Rcd. 7304, 7306 paras. 11-14 (1993) ("*ITI Decision*"); *see also In re AT&T's Private Payphone Commission Plan*, Memorandum Opinion and Order, 7 FCC Rcd. 7135 (1992) ("The Bureau correctly found that it is not unlawful per se for AT&T to pay commissions to PPCs to compensate them for their costs in making operator services available to the end user.").

66 *See ITI Decision*, 8 FCC Rcd at 7306 para. 14; *Qwest Communications Corp. v. Farmers and Merchants Mut. Tel. Co.*, EB-07-MD-001, Memorandum Opinion and Order, 22 FCC Rcd. 17973, _____ ¶ 38 (2007), *recon. in part on other grounds*, 23 FCC Rcd 1615 (2008), *further recon. on other grounds*, 24 FCC Rcd 14801 (2009).

67 *Id.* ¶ 12.

carriers for directing traffic to a particular LEC when that commission is independent of the tariff charges and commission is paid for a service received.[68]

The "revenue sharing agreements" here involve commission or marketing agreements where the CLEC's customer is paid a commission for a service rendered – marketing the services that stimulate calling and generate large volumes of incoming calls. The LECs pay the high volume customers (or a third party) for this service, just as AT&T paid its aggregators in the *ITI Decision*.[69] Just as in the *ITI Decision*, the commission or marketing fee is paid for a legitimate business expense and there is "no relationship or connection between [the LEC'] commission payments and [the LEC's] tariffed charges,"[70] which here are access charges assessed to IXCs, not the parties receiving the Commissions. Here the end users customers' commission are unrelated to the number of lines they obtain or what the tariffed charges are for those lines. In short, the rates for the local lines the CLECs assess these customers are unaffected.

The purpose of Section 203(c) is to "require[] that a carrier adhere to the terms of its published tariff." The revenue sharing agreements at issue here in no way interfere with adherence to the published tariffs.

2. A LEC with Revenue Sharing Arrangements with Third Parties is not Violating Section 254(k)

The Commission seeks comment on whether the type of revenue sharing agreements that the LECs may have with the traffic stimulators violate Section 254(k) of the Act. The types of agreements that CLECs like OmniTel and Tekstar enter into with the traffic stimulators do not implicate the prohibitions in Section 254(k).

68 *Id.* ¶¶ 13-14.

69 *ITI Decision*, ¶¶ 12-14.

70 *Id.* ¶ 14.

Section 254(k) provides in relevant part that "[a] telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition."[71] This prohibition and its implementing rules are "designed to inhibit carriers with market power in regulated service markets from imposing the costs and risks of nonregulated ventures on subscribers to regulated interstate services."[72]

The type of activity Section 254(k) targets does not come into play in connection with the revenue sharing agreements related to access stimulation activities. As a threshold matter, because these agreements involve the CLEC and a third, unrelated party, there is simply no potential cross-subsidization of costs. Section 254(k) is designed to address the cross-subsidization by a regulated carrier of its own competitive, unregulated services, or those of an affiliated entity. In the typical arrangement between a CLEC and conference calling company or chat line, there is no identity of interest or affiliation, but rather an arm's length arrangement. Each independent entity (the CLEC and its end user) is incurring its own costs associated with the service each provides and, thus, they are not subsidizing – and by definition cannot subsidize -- the costs of the other. OmniTel and Tekstar have been unable to find any cases where the Commission or the courts considered applying Section 254(k) to a situation involving two unaffiliated entities. Indeed, in other contexts in which the Congress or Commission has proscribed cross-subsidization of competitive services by a carrier's non-competitive services, it has applied the proscription where the competitive services are provided by the carrier or an affiliate, for example.[73]

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71 47 U.S.C. § 254(k).

72 *Cross-Subsidy Prohibition*, Order, 6 CR 1428, ¶ 6 (FCC May 8, 1997).

73 *See, e.g.*, 47 C.F.R. §§ 32.27(b) and (c); 47 U.S.C. § 272 (accounting procedures that protect against cross-subsidization of RBOC affiliates); *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision*

Further, as already discussed, CLECs like OmniTel and Tekstar do not have the kind of market power that Section 254(k) is meant to rein in. Section 254(k) "addresses the concern that ILECs may attempt to gain an unfair market advantage in competitive markets by allocating to their less competitive services, for which subscribers have no available alternative, an excessive portion of the costs incurred by their competitive operations."[74] As non-dominant carriers, CLECs like OmniTel and Tekstar are not the primary actors on which Section 254(k) is focused.[75] Thus, concerns that these agreements violate the cross-subsidization prohibition are unfounded.

IV. CONCLUSION: THE COMMISSION'S PROPOSED RULES SHOULD ELIMINATE ANY REMAINING ACCCESS STIMULATION ARBITRAGE AND SEND A CLEAR SIGN TO IXCS THAT THEY SHOULD PAY TERMINATING ACCESS CHARGES FOR THE TRAFFIC THEY GENERATE

In conclusion, because of previous Commission decisions to address certain aspects of access stimulation arbitrage, and because of the incentives that LECs and IXCs each have to settle disputes, a market has developed to address access stimulation problems. As a result, the vast majority of OmniTel's and Tekstar's access traffic is covered by agreements with IXCs, and these agreements provide a proper foundation upon which the Commission should base any decision. However, while a market has developed, OmniTel and Tekstar believe that the Commission's proposed solution – which focuses correctly on the issue of whether rates are just and reasonable -- is appropriate because it generally reflects these market agreements.

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of Commercial Mobile Radio Services; Implementation of Section 601(d) of the Telecommunications Act of 1996, 12 FCC Rcd 15668 (1997) (safeguards against cross-subsidization between ILEC and affiliated CMRS providers).

74 *Id.* at ¶ 7.

75 As described earlier in these comments, rural CLECs entering into revenue sharing arrangements do not, in practice have market power, as demonstrated by Omnitel's and Tekstar's experience leading to agreements that provide for compensation considerably below what is permitted under the Commission's current rural CLEC rules.

Finally, if the Commission's rules are to provide benefits for IXCs and LECs and provide certainty and eliminate the rampant litigation associated with the access stimulation issue, the Commission should make clear that a LEC that has entered into revenue sharing agreements with conference calling or similarly situated customers and that terminates interexchange traffic from or to such customers on its network for an IXC is, as a regulatory matter, terminating switched access traffic for that IXC and should be paid at the benchmark rate promptly set forth in the new rule provided it has made the tariff changes required by the CLECs that enter into revenue sharing arrangements.

Respectfully submitted,

Thomas W. Cohen
Edward A. Yorkgitis, Jr.
Randall W. Sifers
KELLEY DRYE & WARREN LLP
3050 K Street NW, Suite 400
Washington, D.C. 20007
(202) 342-8518 (telephone)
(202) 342-8451 (facsimile)
TCohen@Kelleydrye.com

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